SUPREME COURT, U. S.
FILED
JUL 3 1973

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1254

JOSEPH SMITH, SHERIFF OF WORCESTER COUNTY,
APPELLANT,

v.

VALARIE GOGUEN,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Appeal Docketed on March 14, 1973

Probable Jurisdiction Noted on May 21, 1973

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COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

COMMONWEALTH

vs.

VALARIE GOGUEN

Amended Bill Of Exceptions

A complaint was brought against the defendant Valarie Goguen charging that he did publicly treat contemptuously the flag of the United States in violation of G.L. Ch. 264 s. 5. After trial and conviction in the District of Leominster the defendant made a timely appeal to the Superior Court pursuant to G.L. Ch. 278 s. 18. The complaint was tried before a district court justice sitting by designation and a jury on April 14 and 15, 1971.

The defendant filed a Motion to Dismiss the Complaint on the ground that G.L. Ch. 264 s. 5 is unconstitutional on its face and as applied to him in that it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution, and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Part I Article 12 of the Declaration of Rights in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials.

Said motion was argued at the commencement of trial and was denied by the Court. The defendant's exception was duly noted.

At the conclusion of the Commonwealth's case, the defendant filed a Motion for a Directed Verdict which, after argument, was denied by the Court. The defendant's exception was duly noted.

In presenting the defendant's case, the defendant sought to introduce evidence through his expert witness of numer-

ous advertisements in newspapers and magazines, objects of wearing apparel and other items demonstrating contemporary use and treatment of the United States flag for the purpose of assisting the jury in determining whether the defendant's treatment of the United States flag was contemptuous by contemporary standards. After hearing the defendant's offer of proof the Court sustained the Commonwealth's objections to the aforesaid evidence. The defendant's exception was duly noted.

At the close of the defendant's case the defendant filed requests for instructions to the jury. The Court declined to give instructions numbered 3 and 4 which required that the jury in order to find the defendant guilty must find that the flag alleged to have been treated contemptuously was an official flag of the United States within the meaning of, and as defined by Executive Order number 10834, issued by the President of the United States pursuant to Title 4 United States Code, chapter one, section one, and set forth the provisions of said Executive Order. The Court granted defendant's instruction number two but deleted therefrom the word "official". The defendant's exceptions were duly noted.

The jury returned a verdict of guilty and the Court sentenced the defendant to a term of six months in the House of Correction.

The pertinent evidence introduced at the trial is as follows:

Lieutenant Francis A. Arel of the Leominster Police Department testified that he was on duty on January 30, 1970. He observed the defendant Valarie Goguen standing with a group of persons on Main Street in Leominster. The defendant was wearing a short coat, blue jeans and shoes. A cloth American flag, approximately 3 x 5 or 4 x 6 inches was sewn to the blue jeans in the vicinity of the

left portion of the defendant's buttocks. Arel said that he was able to observe the flag clearly.

Lieutenant Arel further testified that he had a conversation with the defendant at that time, and that while he was questioning the defendant about the flag, the other persons present were laughing. Lieutenant Arel later obtained an arrest warrant for the defendant from the Leominster District Court and arrested the defendant when he voluntarily surrendered himself at the Police Station some three days later.

Patrolman Guido V. Barassi of the Leominster Police Department testified that he was on duty on January 30, 1970. He observed the defendant walking in the downtown business district of Leominster, wearing a short coat, casual type pants and a miniature American flag sewn on the left side of his pants.

Whitney Smith, Junior testified on behalf of the defense. His qualifications as an expert vexillologist were not challenged by the Commonwealth.

Mr. Smith testified that the present United States flag was created by altering the British flag at the time of the American revolution. He said that the flag desecration laws were passed in the late nineteenth century to protect the flag from commercial exploitation and use by politicians in their campaigns. Mr. Smith said that he was familiar with contemporary use of the United States flag and had brought with him examples of contemporary commercial and political use of the flag which the defendant offered into evidence. The defendant specifically offered to put into evidence various uses of both the actual design of the United States flag and the stars and stripes pattern as they appear in contemporary magazines, newspapers and products, among them a tie made of flag material containing the pattern of the flag, a pair of pants with a stars and stripes design, and other commercial usages of the flag as well as a hassock or footstool which has an Amer-

ican flag placed on the area where the person using it would sit down, and also a bathing suit made out of the flag design.

Mr. Smith further testified that he was familiar with the requirements for an official United States flag, that he was familiar with the manufacture of flags such as the one the defendant was alleged to have been wearing and that such flags do conform to the official standards.

The foregoing Amended Bill of Exceptions contains all of the evidence material to the questions raised by this Amended Bill of Exceptions.

The defendant being aggrieved by the Court's rulings prays that his several exceptions may be allowed.

This Amended Bill of Exceptions has been timely filed and timely notice of filing and a copy of the foregoing has been given to the Commonwealth.

By his attorneys,
EVAN T. LAWSON
C. MICHAEL MALM

Allowed: May 18, 1971 (William Garbose, D.C.J.)
FILED May 17, 1971

Complaint

TO THE DISTRICT COURT OF LEOMINSTER, in the County of Worcester, and Commonwealth of Massachusetts Francis A. Arel of Leominster in said County in behalf of the COMMONWEALTH OF MASSACHUSETTS, on oath complains that Valarie Goguen of Leominster on the thirtieth day of January, in the year of our Lord one thousand nine hundred and seventy at Leominster did publicly treat contemptuously the flag of the United States in violation of G.L. Chapter 264, Section 5 as amended.

FRANCIS A. AREL
Complainant

WORCESTER, SS.

Received and sworn to this thirty-first day of January in the year of our Lord one thousand nine hundred and seventy before said Court.

William J. Silvia
Clerk

A True Copy
(Seal)
Attest, William P. Silvia, Clerk

[Commonwealth of Massachusetts
Superior Court]
[Title Omitted in Printing]

No. 38705

Docket Entries

Offense: Pub. Treating contemptuously U.S. Flag.

Place: Leom.

Surety and amount: Robert Boudreau, 32 Monument Sq., Leom., Mass. $1,000 (B.B.) 6/16/70 See Reading #3.

Counsel: T. Mulhern, Esq., 340 Main St., Worcester, Mass. disappear 4/17/70
Haskell A. Krassler, 1 State St., Boston, Mass. 4/17/70
Evan T. Lawson 14 Beacon St., Boston, Mass. 6/4/70 3/17/71.
John M. O'Connor Asst. Dist. Atty. for Commonwealth 4/14/71
Justice disposing of case: William Garbose, DCJ.

1970

Mar. 2	1	Appeal filed
Apr. 27		No professional Bondsman (Chmielinskim J.)
June 4	2	Deft's Motion to dismiss, filed. Retain same bail (Barry, D.C.J.)
June 16	3	Order admitting petitioner to bail on personal recogs. dated June 12, 1970. Law #71318 (Spalding, J., S.J.C.)
Apr. 14		Plea—Not Guilty

1971			
Apr.	14	4	Deft. asked Permission to have stenographer at its own expense present at this hearing which court allowed Stenog. (Garbose, D.C.J.) Stenog. Geraldine Geannandrea deft's choice.
	14		Motion #2-after hearing, motion denied and defendant's exception noted (Garbose, DCJ).
1971			
	15	5	Defendant's Motion for a Directed Verdict filed and after hearing denied; Deft's. exceptions noted (Garbose, D.C.J.) Counsel present. Verdict - Guilty. Sentence 6 months House of Correction; no credit (Chap. 279, S33a). Mittimus issued.
	28	6	*ORDER* staying execution of sentence and admitting petitioner to Bail by surety Bond dated April 23, 1971 (Spiegel, J., S.J.C.) (Law #72126).
May	5	7	Bill of Exceptions.
	6		Bill of Exceptions presented (Garbose, D.C.J.) notified Dist. Atty.
	7		Hearing set on Bill of Exceptions on Friday, May 14, 1971 at 10:00 A.M. (Garbose, J.) notified District Attorney and Atty. Evan T. Lawson by Asst. Clerk P. Breen.
	14		After hearing before Garbose, D.C.J. Amended Bill of Exceptions to be filed. Counsel present.

1971

17 8 **Amended Bill of Exceptions.**
18 **Amended Bill of Exceptions allowed (Garbose, D.C.J.)**
Notices mailed 6/3/71.

A Copy,
Attest:
(s) JAMES J. JOYCE
Clerk.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
No. 14,933

WORCESTER COUNTY JANUARY SITTING, 1972

COMMONWEALTH

v.

VALARIE GOGUEN

DEFENDANT'S BRIEF

STATEMENT OF THE CASE

A complaint was brought against the defendant, Valarie Goguen (Goguen), in the District Court of Leominister charging that he "did publicly treat contemptuously the flag of the United States" in violation of G.L. Ch. 264 §5 (R. 1, 4). After trial in the District Court Goguen was convicted and appealed to the Worcester County Superior Court (R. 1).

In the Superior Court Goguen filed a Motion to Dismiss the Complaint on the grounds that G.L. Ch. 264 §5 is unconstitutional on its face and as applied to him in that it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution, and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Part I, Article 12, of the Declaration of Rights in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials (R. 1). The Motion to Dismiss the Complaint was denied, to which Goguen took exception (R. 2).

On April 14 and 15 trial was had before a district court justice sitting by designation and a jury (R. 1).

A summary of the material evidence introduced by the Commonwealth is as follows:

On January 30, 1970, a Leominister Police officer observed Goguen walking in the business district of Leominister, wearing a short coat and casual type pants. Sewn to the left side of Goguen's pants was a miniature American flag (R. 3).

On the same day, another Leominster police officer observed Goguen standing with a group of persons on Main Street in Leominster (R. 2, 3). Goguen was wearing a short coat, blue jeans and shoes. The officer was able to observe a cloth American flag, approximately 3 x 5 or 4 x 6 inches sewn to blue jeans in the area of the left portion of Goguen's buttocks. While the officer questioned Goguen concerning the flag, the other persons present were laughing (R. 3).

At the close of the Commonwealth's case, Goguen filed a Motion for a Directed Verdict which was denied, to which Goguen took exception (R. 2).

A summary of the material evidence introduced by the defendant is as follows:

A professional vexillologist was qualified as an expert and testified that the present United States flag was created by altering the British flag at the time of the American revolution. He said that the flag desecration laws were passed in the late ninteenth century to protect the flag from commercial exploitation and use by politicians in their campaigns. The vexillologist further testified that flags such as the one the defendant was wearing do not conform to the official standards as set forth in Executive Order number 10834, pursuant to Title 4 United States Code, Chapter one, section one (R. 3, 4).

Goguen sought to introduce, through his expert, evidence of advertisements in newspapers and magazines, objects of wearing apparel and other items demonstrating

contemporary use and treatment of the United States flag for the purpose of assisting the jury in determining whether the defendant's treatment of the United States flag was contemptuous by contemporary standards (R. 2). The Commonwealth objected and the defendant offered to put into evidence various uses of both the actual design of the United States flag and the stars and stripes pattern as they appear in contemporary magazines, newspapers and products, among them a tie made of flag material containing the pattern of the flag, a pair of pants with a stars and stripes design, a hassock or footstool with an American flag placed on the area where the person using it would sit down and a bathing suit made out of the flag design (R. 3, 4).

The Court sustained the Commonwealth's objection to which the defendant took exception (R. 2).

The Defendant filed requests for instructions to the jury. The Court declined to give instructions numbered 3 and 4 which required that the jury, in order to find the defendant guilty, must find that the flag alleged to have been treated contemptuously was an official flag of the United States within the meaning of, and as defined by Executive Order number 10834, issued by the President of the United States pursuant to title 4 United States Code, chapter one, section one, to which the defendant took exception (R. 2).

The jury returned a verdict of guilty and the Court sentenced Goguen to a term of six months in the House of Correction.

SUMMARY OF ARGUMENT

General Laws Ch. 264 §5 on its face infringes upon the defendant's right to freedom of speech as guaranteed by the First Amendment of the United States Constitution. (Pages 6-7) The conduct of the defendant in the

present case was symbolic speech protected by the First Amendment of the Constitution. (Pages 7-15)

General Laws Ch. 264 §5 violates on its face the due process clause of the Fourteenth Amendment of the United States Constitution in that it is overly broad and brings within its ambit constitutionally protected activity. (Pages 15-21)

The Commonwealth failed to prove its case against the defendant by its failure to prove the required element of intent. (Pages 21-23)

The decision of the lower court in convicting the defendant should be reversed because the defendant did not treat contemptuously a "flag of the United States." (Pages 23-24)

The trial Judge committed reversible error by failing to allow defendant to introduce through his expert examples of contemporary flag usage. (Page 25)

ARGUMENT

A. G.L. Ch. 264 §5 on its Face and as Applied in the Instant Case Unconstitutionally Infringes Upon the Defendant's Right to Freedom of Speech.

1. *G.L. Ch. 264 §5 is unconstitutional on its face.*

The complaint charges that Goguen "did publicly treat contemptuously the flag of the United States in violation of G.L. Ch. 264 §5." (R. 1).

That statute provides in pertinent part that:

> Whoever publicly . . . treats contemptuously the flag of the United States . . . whether such flag is public or private property . . . shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both.

G.L. Ch. 264 §5 is on its face an unconstitutional restraint upon the right of freedom of speech guaranteed by the First Amendment to the United States Constitution.

It can not be disputed that the primary thrust of the First Amendment is to guarantee and protect the right to express views, however unorthodox or unpopular, about politics, nationalism and religion. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). Furthermore, the right to speak freely on political matters has been held to apply to the expression of opinion concerning the nation's flag.

> We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinions about our flag, *including those opinions which are defiant or contemptuous.* (*Street* v. *New York,* 394 U.S. 576, 593 (1969), emphasis added).

In *Street* the Court was faced with a New York statute which was for all practical purposes similar to G.L. Ch. 264 §5. It provided that it was a misdemeanor:

> (to) publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act (any flag of the United States) (*Street* v. *New York, supra,* at 578.)

Upon learning that James Meredith had been shot, Street went to an intersection and burned his United States flag, saying "We don't need no damn flag." *Id.* p. 578-579. The Court held that Street could not be convicted for his words which cast contempt upon the flag:

> Since appellant could not constitutionally be punished under §1425, subd. 16, par. d, for his speech, and since we have found that he may have been so punished, his conviction cannot be permitted to stand. (*Id.* at 594).

G.L. Ch. 264 §5 purports by its general language to punish the mere verbal expression of ideas and thus

clearly contradicts the constitutionally protected right to freedom of speech guaranteed by the First Amendment. The statute should therefore be declared unconstitutional and Goguen's conviction should be reversed.

2. *The Defendant's conduct was constitutionally protected symbolic speech.*

The specific conduct for which Goguen was convicted was publicly wearing a patch representing the flag of the United States on the seat of his pants. Such conduct on the part of the defendant clearly expressed an idea, albeit unpopular or unpatriotic, about the flag or about the country it symbolizes. It can not be denied that such conduct is properly classified as symbolic speech. Indeed, certain courts have gone so far as to take judicial notice of the symbolic significance of the American flag. *Hodsdon* v. *Buckson,* 310 F. Supp. 528, 533 (D. Del. 1970), while others point out that it is "self-evident that most, if not all, conduct associated with the United States flag is symbolic speech." *Crosson* v. *Silver,* 319 F. Supp. 1084, 1086 (D. Ariz. 1970). Goguen may have meant to show that he believed that America was a fit place only to sit on, or the proximity to that portion of his anatomy might have had more vulgar connotations. Nonetheless, the strong and forceful communication of ideas is unmistakable. While it is recognized that not all conduct which also serves to express ideas is constitutionally protected symbolic speech, see *United States* v. *O'Brien,* 391 U.S. 367 (1968), it is submitted that the conduct in the case at bar is so closely related to the direct expression of ideas that it should be treated as "pure speech" and thus be subject to First Amendment protection.

When conduct which communicates ideas is also constitutionally protected speech is a difficult question. The United States Supreme Court has not passed upon the specific question of whether conduct related to the United

States flag can be characterized as constitutionally protected symbolic speech. Each case which has come before the Court in this area has either been decided upon other grounds (See, *Anderson* v. *Georgia*, 390 U.S. 206 (1968), *Street* v. *New York*, 394 U.S. 576 (1969) and *Cowgill* v. *California*, 396 U.S. 371 (1970)) or left undecided by an equally divided Court. See *Radich* v. *New York*, 39 U.S. L.W. 3422 (March 24, 1971).

However, the Court has held that wearing black arm bands is constitutionally protected symbolic speech. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). Similarly, the display of a red flag as a symbol of opposition to organized government, *Stromberg* v. *California*, 283 U.S. 359 (1931), and wearing a military uniform in a protest play, *Schacht* v. *United States*, 398 U.S. 58 (1970), have been found to be protected.

The greatest difficulty arises in delineating between conduct which is clearly and solely the expression of ideas (e.g. wearing arm bands) and conduct which while expressing ideas may also be such that the state has a legitimate interest in controlling it. In *United States* v. *O'Brien, supra*, the Court articulated standards by which the government can constitutionally prohibit conduct where speech and no speech elements are combined.

> (T)he Government regulation is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (*O'Brien, supra*, 391 U.S. at 377.)

In *O'Brien* the Court upheld a conviction for burning a draft card. The Court found that the prohibition against

destroying draft cards was a necessary and proper exercise of the government's power to raise and support an army and to insure efficient functioning of the Selective Service System. Quite different considerations are present in the instant case.

First, the government has no interest in protecting the American flag from "contempt". On the contrary, it is well established that the state cannot enforce a showing of respect for the flag. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), *Street, supra.*

Second, it is clear that the express purpose of G.L. Ch. 264 §5 is to proscribe the expression of certain kinds of ideas about the flag.

Third, the restriction on First Amendment freedoms in the instant case is far from incidental. Instead, it is central to the purposes of the statute.

Were Goguen charged with burning, mutilating or trampling upon the flag a different result might obtain. See, e.g. *Crosson* v. *Silver, supra.* However in the instant case the defendant merely wore a replica of the flag in a certain manner. Here the government seeks to punish a peaceful act which does no more than express an idea. Such conduct, like wearing armbands and flying red flags, is purely related to the expression of ideas. As such, it should be accorded the same protection under the First Amendment as those forms of symbolic speech.

3. *The expression of opinion conveyed by the defendant's conduct was constitutionally protected.*

Goguen has been convicted and sentenced to six months in the House of Correction for conduct expressing strong, negative feelings about the United States through the use of its symbol, the flag. In *Street* v. *New York, supra,* the Supreme Court held that the expression of defiant or indeed contemptuous opinions about the flag or the country is constitutionally protected. In determining that Street

could not have been punished for his expression of opinion, the Court applied a quadripartite test.

> In these circumstances we can think of four governmental interests which might conceivably have been furthered by punishing appellant for his words: (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem. (*Street, supra,* at 590-591.)

The Court concluded that none of the foregoing government interests applied to Street. An application of that analysis to the case at bar yields the same result; that Goguen can not constitutionally be punished for his expression of opinion.

As in *Street,* Goguen "did not urge anyone to do anything unlawful", *Id.* at 591. As in *Street,* Goguen's conviction cannot stand because of a "possible tendency" of his expressed idea to "provoke violent retaliation." As the Court said in *Street,*

> (t)hough it is conceivable that some listeners might have been moved to retalitate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of "fighting words" which are likely to provoke the average person to retaliation, and thereby cause a breach of the peace. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 574 (1942). (*Id.* at 592.)

As in *Street*, the fact that the ideas expressed by Goguen might offend or shock passers-by cannot support his conviction.

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. (*Id.* at 592.)

More recently the Court has held that the public use of a particularly offensive "vulgar allusion" could not be constitutionally punished. *Cohen* v. *California*, — U.S. —, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). The Court was of the opinion that despite the objectionable and offensive nature of Cohen's expression, it was permissible speech in a public forum.

> . . . (In) arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, e.g., Organization for a Better Austin v. Keefe, 401 U.S. , 91 S. Ct. 1575, 28 L. Ed. 2d (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., Rown v. United States Post Office Dept., 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970), we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech". (*Id.* at

738, 90 S. Ct. at 1491. *Cohen, supra,* 91 S. Ct. 1786, 29 L. Ed. 2d 291.)

As in *Street,* the Court in *Cohen* also considered and rejected an argument that the communication might incite violent retaliation. The Court reiterated that such a rationale must be based upon a probability of violence rather than an "undifferentiated fear or apprehension of disturbance."

> The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 103, 508, 89 S. Ct. 733, 737, 21 L. Ed. 2d 131 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. (*Cohen, supra,* — U.S. —, 91 S. Ct. 1787, 29 L. Ed. 2d 292).

In the instant case there has been no showing that Goguen's expression was intended or likely to incite violence, or that violence or civil disturbance was caused

by it. Indeed, the evidence was that passers-by were amused rather than angered. (R. 3).

Also, it is quite clear that the fourth rationale set forth in *Street*, of causing proper respect for our national emblem, cannot withstand constitutional scrutiny. The state cannot constitutionally require its citizens to bow to some political orthodoxy. *Street, supra,* at 593.

Thus, since Goguen's conduct amounted to constitutionally protected symbolic speech, and since the ideas conveyed are similarly constitutionally protected, the Court below erred in denying Goguen's motion to dismiss the complaint and his motion for a directed verdict. G.L. Ch. 264 §5 is unconstitutional on its face because it purports to punish constitutionally protected expression of ideas. Furthermore, upon the facts of this case, the defendant was convicted for exercising constitutionally protected freedom of expression. The conviction below should therefore be reversed by this Court.

B. General Laws Ch. 264 §5 on its Face Violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution in That it Is Overly Broad.

In the area of First Amendment freedom the arguments for why a statute is overly broad in violation of the Fourteenth Amendment are often similar to the First Amendment arguments. This is true because the result or effect of each constitutional infirmity in the restriction of free individual expression is usually the same.

The Supreme Court has consistently struck down statutes which are so overbroad as to bring within their ambit conduct protected by the First Amendment. *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Thornhill* v. *Alabama,* 310 U.S. 88 (1948); *Stromberg* v. *California,* 283 U.S. 503 (1931). More recently several courts across the country have held flag desecration statutes very sim-

ilar to G.L. Ch. 264 §5 to be unconstitutionally overbroad. *Parker* v. *Morgan*, 322 F. Supp. 585 (W.D.N.C., 1971). *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir., 1970), cert. denied 400 U.S. 956 (1970); *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (Del., 1970); *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz., 1970).

Although distinguishable from the case at bar, the Supreme Court in the case of *United States* v. *O'Brien, supra*, set forth criterion for determining when the government may regulate symbolic conduct or conduct which has "speech" and "non-speech" aspects. As was stated earlier, a government regulation in this area will not be constitutionally justified unless it meets the following four criteria:

i. It is within the constitutional powers of the government;
ii. it furthers an important or substantial government interest;
iii. the governmental interest is unrelated to the suppression of free speech; and
iv. the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of legitimate government interest. (*O'Brien*, supra, 377).

The only state governmental power which could justify regulation of words or conduct pertaining to the flag would be the police power. *Crosson* v. *Silver, supra.* Thus it must be determined whether there is an important governmental interest to be served by regulating the treatment of the United States flag through the state's police powers.

The Supreme Court in *Street, supra,* analyzed what might be the government's interest in regulating contemptuous words directed at the flag. Although the statute in the present case regulates both speech and conduct,

there appears to be no rational difference in state interest between regulation of words and regulation of acts which relate to the flag, if it is conceded that the state has no property interest in flags belonging to individuals. *Crosson* v. *Silver, supra,* pp. 1087-88.

In *Street* the Court found that the state's interest might be (1) an interest in deterring incitement of others to commit unlawful acts; (2) an interest in preventing words so inflammatory as to provoke others to retaliate physically against the speaker, thus causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked at such words; and (4) an interest in assuring conduct showing proper respect for our national emblem. The Court held that none of these interests could constitutionally justify conviction of the appellant under New York's flag statute for his use of contemptuous words directed against the United States flag. *Street* v. *New York, supra,* p. 591.

It is suggested that the conduct of the appellant in the present case, as the speech in *Street,* did not incite others to unlawful acts, nor did it provoke others to physical retaliation against the appellant (R. 3). In fact, the statute on its face does not attempt to limit itself to those acts and words which might incite others to unlawful conduct or to a breach of the peace, but proscribes all words or acts, however innocuous, which show contempt for our flag. Thus the present case is distinguishable from that in which the legislature has narrowly drawn a proscription against conduct within the legislative competence, see *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), and the statute on its face goes far beyond any legitimate state interest of preventing incitement to riot or a breach of the peace. An individual could be prosecuted under General Laws, c. 264 §5 for sticking his tongue out at the flag or for revealing his distaste for the flag as it re-

presents the presently embodied government administration. The Commonwealth has thus gone far beyond what might have been a legitimate state interest under the first two possibilities suggested by *Street*.

It is also well settled that First Amendment conduct may not be prohibited merely because it offends the sensibilities of those who may observe or listen (*Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Street* v. *New York*, *supra*), nor may the state legislate allegiance to or respect for our flag. *Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

If it is assumed for the sake of argument that the state might have a legitimate interest in regulating words and conduct with respect to the flag, and that this interest would satisfy the second criterion set forth in *O'Brien*, the fact that General Laws, Chapter 264, §5 goes far beyond the furtherance of that governmental interest and in so doing infringes upon First Amendment freedoms indicates that it fails under the fourth *O'Brien* criterion.

In *O'Brien*, the Court found a legitimate governmental interest in requiring a person to preserve his draft card which was totally independent of the free speech element involved in destroying a draft card. The court thus found that

> The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. (*O'Brien*, *supra*, p. 382).

The Commonwealth in the present case has directed its attention to communication integral to the apellant's conduct. In these times when our country is so divided between the hawks and the doves and between the "love-it-or-leave-it" and those who are critical of our government's policies, there is nothing equivocal about flag usage. A

flag-draped casket, a flag on a policeman's shoulder or lapel, a flag displayed upside down and a flag on the seat of the pants; each has its meaning. General Laws, Chapter 264, §5 is designed to prevent the latter from being expressed and is thus an unconstitutionally overbroad restriction of freedom of speech. The often quoted words of Justice Jackson in the *Barnette* decision are not new, but they offer strong insight into the question before this court:

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.*
>
> If these is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. (*Barnette, supra* pp. 641-642 emphasis added).

The United States District Court for the District of Maryland recently struck down a Maryland statute al-

most identical to that in the present case on the grounds that it proscribed within its ambit constitutionally protected conduct and words.

> The statute attacked here, however, makes no effort to limit the facts and circumstances under which gestures are forbidden. The Court believes that the rationales of *Barnette* and *Stromberg* together compel the conclusion that the punishment of peaceful symbolic acts rejecting the political ideas bespoken by the flag is as alien to the mandate of the First Amendment as is compulsion to signify adherence. That this statute proceeds, heedless of the guarantees of that amendment, determines its invalidity. (*Hodsdon* v. *Buckson*, 310 F. Supp. 528 (1970)).

The defendant in the present case has been convicted under an almost identical statute which is equally unconstitutional, and thus this Court should reverse his conviction below.

C. The Commonwealth Failed to Prove its Case Against the Defendant by its Failure to Prove the Element of Intent.

Although it has not been discussed by many Courts in dealing with flag desecration statutes, there is a strong reason why intent should be an element of the crime of flag desecration. See Note; *Flag Desecration: Illegal Conduct on Protected Expression*, 22 Case West. L. Rev. 555 (1971).

The Supreme Court has held in the case of *Smith* v. *California*, 361 U.S. 147 (1959) that a bookstore owner could not be convicted under a local statute which made it a crime to sell obscene literature, regardless of whether the proprietor knew the contents of the books sold. The Court in *Smith* directed itself to the problem of applying strict liability in the area of First Amendment freedoms:

> But our holding in *Roth* does not recognize any state

> power to restrict the dissemmation of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. (*Id.* at 152).

The Court in *Smith* went on to compare the censorship statute with strict liability statutes in the area of food distribution.

> There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller. (*Id.* at 152-153).

The New York Court of Appeals dismissed an argument that intent had to be an element for conviction under their flag desecration statute in the case of *Radich* v. *New York*, 26 N.Y. 2d 114 (1970), affd. by an equally divided Court, 39 U.S. L.W. 3422 (dec. Mar. 24, 1971). However, the cases upon which the New York Court's decision was based were in the area of food and liquor distribution and are thus clearly distinguishable under *Smith, supra.*

The Supreme Court of the State of Washington has held that a criminal intent is a sine qua non for conviction under its flag desecration statute.

> . . . (t)o hold up to contempt is conduct involving moral turpitude. Therefore, to sustain a conviction of desecrating the flag . . . the acts must have been done knowingly and intentionally with the intent and purpose of . . . desecrating it or holding it publicly up to contempt. (*State* v. *Turner*, 474 P.2d 91, 94-95 (1970)).

Certainly the state would not attempt to prosecute a person for burning a worn flag for this is the recognized

flag etiquette for discarding old flags. However, the Commonwealth might very well prosecute one who burns a flag in protest. The element of intent is inherent. The Commonwealth in the present case introduced no evidence to show whether the defendant's conduct was intended to be contemptuous. The Court below should thus have allowed defendant's motion for a directed verdict. This Court should therefore reverse the conviction below.

D. The Decision of the Lower Court in Convicting the Defendant Should Be Reversed Because the Defendant Did Not Treat Contemptuously a "Flag of the United States."

The flag of the United States is defined by Executive order number 10834 issued by the President of the United States pursuant to Title 4, United States Code, chapter one, section one. Mr. Smith, the defendant's expert vexillologist, testified at the trial that he was familiar with the type of "flag" the defendant was alleged to have been wearing and that such a flag does not conform to the official standards (R. 4).

It is obvious that there must be some definition of what is a flag of the United States within the meaning of G.L. c. 264 §5:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. (*Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1930)).

In the case of *Parker* v. *Morgan*, 322 F. Supp. 585 (1971), a United States District Court held unconstitutional the North Carolina flag statute, stating:

> Thus we think for a flag control statute to be constitutional it must precisely define a flag and carefully avoid expropriation of color and form other than the defined emblem itself, e.g. it seems to us that

red, white and blue trousers with or without stripes are trousers and not a flag, and it is beyond the state's competence to dictate color and design of clothing, even bad taste clothing (*Parker* at 588).

The Massachusetts legislature has recently amended Chapter 264, §5 by the Acts of 1971, Chapter 74, to read "such flag *or any representation thereof*" (emphasis added). It seems as if the legislature has by this amendment tried to carry the flag desecration statute to its extreme; i.e. "by expropriation of color and form". It can thus be implied that the law as it existed at the time of the conviction below applied only to actual flags of the United States. But where is the line to be drawn? Is a child's drawing of a flag "the flag of the United States" within G.L. c. 264 §5?

In order to avoid such ridiculous extremes, the line should be drawn according to the official definition of the United States flag. Thus the Court below erred in not instructing the jury that in order to find the defendant guilty it had to find that the flag used in the alleged contemptuous treatment was an official flag as defined by Executive Order number 10834 and the defendant conviction should be reversed.

E. The Trial Judge Committed Reversible Error by Failing to Allow Defendant to Introduce Through His Expert Examples of Contemporary Flag Usage.

In order for the jury to properly decide whether the action of the defendant was in fact contemptuous, it had to relate the conduct of the defendant to standards of present day usage of the flag. The defendant offered to show to the jury, through his expert, evidence which would indicate that his treatment of the flag was no different or more contemptuous than its every day use in movies, magazines, newspapers, clothing and numerous other commercial and non-commercial articles. The failure of

the trial judge to allow the defendant to introduce this evidence to the jury was prejudicial error and thus the defendant's conviction should be reversed.

CONCLUSION

The conduct of the defendant in using the flag in an act of protest against our government is as pure a form of "symbolic speech" as the wearing of a black arm band, the clenched fist salute and the use of a red flag as a symbol against organized government, all of which are protected by our Constitution. Those who love our flag and would thus allow the state to prohibit protest against it or protest against our government by use of the flag are apparently well motivated, but they can only serve to defeat their purpose. For the love which is embodied in our flag is not derived from its material or workmanship, but from the constitutional ideas of democracy and individual freedom which that flag represents. If the state is allowed to imprison the defendant for his peaceful political protest, this will be an act of flag desecration far superior to the harmless conduct of the defendant.

The judgment of the Court below should thus be reversed.

Respectfully submitted,
C. MICHAEL MALM
EVAN T. LAWSON
Attorneys for the Defendant

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
WORCESTER COUNTY JANUARY SITTING, 1972
No. 14,933

COMMONWEALTH
v.
VALARIE GOGUEN

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

A complaint, District Court No. 38705, was brought in the District Court of Leominster on January 30, 1970, against the defendant, Valarie Goguen, which charged that the defendant did publicly treat contemptuously the flag of the United States in violation of G.L. c. 264, §5 (R. 1).

The defendant was found guilty in the Leominster District Court and duly filed his appeal to the Worcester Superior Court (R. 1).

Trial was commenced at the Worcester Superior Court on the fourteenth day of April, 1971 (R. 1). During the course of the trial the defendant filed the following motions.

1. Motion to dismiss. This motion was heard prior to presentation of evidence. The motion was denied and the defendant took exception (R. 1-2).

The evidence during the trial was that on January 30, 1970, the defendant, Goguen, was observed walking on Main Street in Leominster and at that time police officers observed that he had an American flag, approximately 3″ x 5″ or 4″ x 6″ sewn to his blue jeans in the area of his buttocks; that a crowd of people was gathering around the defendant and that some of those people were laughing (R. 2-3).

2. At the conclusion of the Commonwealth's case, the defendant filed a motion for directed verdict. After argument, the motion was denied and the defendant's exception was duly noted.

The jury returned a verdict of guilty and the defendant, Goguen, received a sentence of imprisonment of six months in the House of Correction (R. 2, 6).

The case is before the court on a bill of exceptions (R. 1-4).

SUMMARY OF EXCEPTIONS

Exceptions are presented to the court as follows:

1. That the trial court erred in denying defendant's motion to dismiss because G.L. c. 264, § 5, fails to charge a crime and because it is unconstitutional (Excep. 1; R. 1-2).

2. That the trial court erred in denying the motion for a directed verdict on the complaint at the close of the Commonwealth's case (Excep. 2; R. 2).

3. That the trial court erred in excluding evidence by an expert, a vexillologist, as to the use of the American flag in advertisements, in newspapers, magazines, in objects of wearing apparel and other items that are used in the United States (R. 2).

4. That the trial court erred in refusing to instruct the jury as requested in instructions Nos. 3 and 4 in which it was requested that the judge charge that it had to be an "official" American flag (R. 2).

ARGUMENT

There was no error in the trial court's denying defendant's motion to dismiss or the defendant's motion for a directed verdict.

The defendant filed a motion to dismiss prior to commencement of trial. After oral argument, the motion was denied and the defendant duly noted his exceptions (R. 2).

There was no error in denying this motion. The issue

raised in this motion was that G.L. c. 264, § 5, was unconstitutional because it violated the defendant's right to freedom of speech and the statute is overly broad and vague and incapable of fair and reasonable interpretation (R. 1).

The Commonwealth contends that G.L. c. 264, § 5, does not deprive the defendant of freedom of speech. The statute refers to affirmative overt acts against the American flag and does not refer to speeches against the American flag. We are dealing with a statute that was passed to prevent desecration of the American flag by an act of a person.

General Laws, c. 264, § 5, reads "Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts . . ." It is submitted that the words mutilate, trample upon, deface or treat contemptuously refer to overt acts against the flag and not to speech against the flag.

It is submitted that the Commonwealth of Massachusetts, as well as any other state, has the authority to pass a statute prohibiting desecration of the American flag. The Commonwealth has the authority to protect the American flag from acts of desecration and disgrace. The legitimate state interest in the protection of the flag was early recognized in *Halter* v. *Nebraska*, 205 U.S. 34 (1907). Justice Harlan stated in that case "[I]t has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907).

The Commonwealth has a legitimate interest in preventing breaches of the peace. The fact that in this case no breach occurred is immaterial. At another time a disturbance might have been caused by the defendant's actions.

The state may legitimately control such activities in preventing violence and maintaining public order. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).

General Laws c. 264, § 5, is a deliberate act of the Massachusetts legislature to prevent desecration of the American flag and it comes before the courts with the presumption of constitutionality and should be upheld unless its unconstitutionality clearly, positively and unmistakably appears.

Robertson v. *Ott*, 284 F. Supp. 735.

Hannan v. *Haverhill*, 38 F. Supp. 234, 120 F.2d 87; cert. den. 314 U.S. 641 (1941).

Where a statute is susceptible of two constructions, one which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which will render it valid if such can be done without violence to a reasonable meaning of the language used, even though other construction may be equally reasonable.

Miller v. *Municipal Court*, 22 Cal. 2d 818, 828 (1943).

Los Angeles v. *Belridge Oil Company*, 42 Cal. 2d 823, 832.

Norman R. Gravin, Inc. v. *Ford Motor Company*, 163 F. Supp. 42.

The defendant in his brief relies heavily on the decision in *Street* v. *New York*, 394 U.S. 576 (1969), but it is respectfully submitted that the New York statute in *Street* v. *New York*, is not the same as the statute in effect in Massachusetts. A reading of G.L. c. 264, § 5, shows that our statute relates to overt acts against the flag. Nowhere does it contain, as in the New York statute, the words "by act or words." In *Street* heavy emphasis was laid on the use of the term "words" in the New York statute. This placed

the New York statute under the First and Fourteenth Amendments regarding the defendant's right to freedom of speech.

The defendant, Goguen, was not charged with an act of contempt against the flag for something he said but, rather, he was charged with an overt act of desecration against the American flag, wearing the American flag sewn to the seat of his pants in the area of his buttocks.

The defendant argues that the wearing of the American flag on the seat of his pants was a "symbolic speech" and this protects him under the First Amendment.

However, the government contends that this was not an act of "symbolic speech" but rather an overt act.

In *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), Chief Justice Warren said "we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Even if we concede that the defendant's acts were "symbolic speech" it does not follow that the same kind of freedom is afforded him by the First Amendment as is afforded to those who communicate ideas by pure speech. Where speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in controlling the non-speech element can justify incidental limitations on First Amendment freedoms. *United States* v. *O'Brien, supra.*

The constitutional guarantee of free speech covers the substance rather than the form of communication and the state may regulate the use of a particular form, if it does so from a legitimate state interest.

The element of contempt can be inferred by the conduct of the defendant. The evidence was that the defendant had sewn to the seat of his pants in the area of his buttocks an

American flag and was publicly displaying this on Main Street in Leominster. The jury could draw a reasonable inference that this overt act was done by the defendant to cast contempt on the American flag.

Proof of defendant's intent depended entirely upon the inferences of which the evidence was rationally susceptible. These inferences need not be necessary or inescapable. It is enough if they are reasonable and are not too remote or prohibited by some rule of law. *Commonwealth* v. *Williams*, 312 Mass. 553, 557.

The intention of the defendant was a question of fact to be determined from all the circumstances. *Commonwealth* v. *Walker*, 108 Mass. 309.

There was no error in the trial judge's ruling excluding testimony regarding various use of the United States flag and the stars and stripes pattern.

The defendant, through Whitney Smith, a vexillologist, attempted to put into evidence various national magazines, newspapers and other periodicals, and articles of clothing and other products (R. 3-4). The Commonwealth objected to their admissibility on the ground that it was not relevant. The trial judge excluded such evidence and the defendant noted exception and made offer of proof (R. 2).

At no time was the vexillologist ever asked for his expert opinion. He was merely being used to try to put into evidence various articles described above.

Expert testimony may be appropriate at the discretion of the trial judge even though not necessary.

Peloquin v. *Robert Northridge Furniture Co.*, 341 Mass. 543, 547.

Commonwealth v. *Butynski*, 339 Mass. 151, 153, 158.

Expert testimony is permitted only where the inference to be drawn is one for which more than the equipment of

everyday experience is required. *Commonwealth* v. *Makarewicz*, 333 Mass. 575, 591-592.

It is submitted that the subject matter of the use of the American flag was one that would not require expert testimony and it is proper to assume that jurymen read national magazines, newspapers and periodicals in everyday life and are familiar with their contents.

Some exceptions have been made to the rule on expert testimony. G.L. c. 272, § 28F, relating to expert testimony in an obscene book case. G.L. c. 233, § 79C, relating to expert testimony in medical malpractice cases. Nowhere in our statutes has an exception been made for an expert to testify in a case involving the American flag.

It is submitted that this is a matter within the discretion of the trial judge and his refusal to allow this evidence to be presented to the jury as to the use of the American flag was not an abuse of discretion. It was not relevant to this complaint as to the use of the American flag or replicas of American flags in other states of this country.

There was no error in the trial judge's refusal to charge that the jury must find that the flag involved was an "official" American flag.

The trial judge charged the jury that they must find that it was an American flag, in accordance with G.L. c. 264, § 5, which reads "Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . ."

Nowhere in this statute does the word "official" appear. The Legislature intended to protect all American flags and not just "official" flags as spelled out in Executive Order 10,834.

It is common knowledge that very few American flags that fly over our land meet the strict requirements of Executive Order 10,834.

CONCLUSION

For the reasons stated above, there was no error and the judgment of the Superior Court should be affirmed.

Respectfully submitted,

WILLIAM T. BUCKLEY
District Attorney
for the Middle District
JOHN M. O'CONNOR
Assistant District Attorney

SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 14,933

COMMONWEALTH *v.* VALARIE GOGUEN

(Rescript Opinion - February 2, 1972)

The defendant was convicted of publicly treating contemptuously the flag of the United States in violation of G.L. c. 264, § 5. The case is before us on the defendant's amended bill of exceptions. There was evidence that on Main Street in Leominster he was wearing a cloth American flag sewn to the seat of his blue jeans, and that certain bystanders were amused. We reject his claim that the statute is on its face or as applied to him a restraint upon the right of freedom of speech guaranteed by the First Amendment to the Constitution of the United States. *Halter* v. *Nebraska*, 205 U.S. 34, 41. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574. *United States* v. *O'Brien*, 391 U.S. 367, 376. *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 743-746 (S.D. Ill.). *Oldroyd* v. *Kugler*, 327 F. Supp. 176, 178 (D. N.J.). Compare *Cowgill* v. *California*, 396 U.S. 371, 372 (concurring opinion of Harlan, J.); *Hiett* v. *United States*, 415 F. 2d 664, 672 (5th Cir.), *cert. den. sub nom. United States* v. *Hiett*, 397 U.S. 936. *Long Island Vietnam Moratorium Comm.* v. *Cahn*, 437 F. 2d 344, 348-350 (2d Cir.), *cert. den.* 400 U.S. 956. His communication, if any, was so thoroughly inarticulate as to lack the slightest redeeming social importance. See *Roth* v. *United States*, 354 U.S. 476, 484. He was not prosecuted for being "intellectually . . . diverse" or for "speech," as in *Street* v. *New York*, 394 U.S. 576, 593-594, or for a "vulgar allusion," as in *Cohen* v. *California*, 403 U.S. 15, 20. Whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here. *Sutherland* v. *DeWulf*, *supra*, at 746-749. *Oldroyd* v. *Kugler*, *supra*, at 178-179. See *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340. Compare Rep. A. G., Pub. Doc. No. 12 (1968)

192-193. Compare *Hoffman* v. *United States*, 445 F. 2d 226, 228-229 (D.C. Cir.), with *Hodsdon* v. *Buckson*, 310 F. Supp. 528, 536 (D. Del.), *Crosson* v. *Silver*, 319 F. Supp. 1084, 1089-1090 (D. Ariz.), and *Parker* v. *Morgan*, 322 F. Supp. 585, 588-593 (W. D. N. C.). The jury could infer that the violation was intentional without reviewing any words of the defendant. *Commonwealth* v. *Williams*, 312 Mass. 553, 557. *State* v. *Turner*, 78 Wash. 2d 276, 283-284. See *People* v. *Radich*, 26 N.Y. 2d 114, 125, *aff'd.* by an equally divided court, *sub. nom. Radich* v. *New York*, 401 U.S. 531. Compare *Smith* v. *California*, 361 U.S. 147, 152. The statute does not require that the flag be "official." There was no abuse of discretion in excluding evidence offered through a "vexillologist" as to the contemporary use and treatment of the flag. *Johnson* v. *Orange*, 320 Mass. 336, 338. *Scully* v. *Joseph Connolly Ice Cream Sales Corp.*, 336 Mass. 392, 394. There was no error.

Exceptions overruled.

UNITED STATE
DISTRICT OF

TES DISTRICT COURT
F MASSACHUSETTS

VALAR
PET

Misc. Civil No. 72-22-LC

RIE GOGUEN
TITIONER

v.

JOSEPH SMITH
of Worc

TH, as he is Sheriff
cester County

RESP

SPONDENT

HABE

CAUSE—
EAS CORPUS

DOCKET

T ENTRIES

1972

Feb. 23 Petition for Writ
of Habeas Corpus, filed.

23 CAMPBELL, D. J.
Ct directs OSC to issue rtnble
2/28/72; 4 pm; o
only on quest. bail.

23 Order to Show
Cause issued, returnable Feb-
ruary 28, 1972 at
t 5:00 PM and to appear in the
Court of Appeals
s Courtroom only on question of
bail on February
y 29, 1972 at 4:00 PM.

23 Marshal's return
n of summons w/s/o 2-23-72,
filed.

28 Respondent's mo
otion to dismiss; Return; and
Memo in opp to
applica for bail.

29 CAMPBELL, D. J.
J. Hearing upon ret. OSC on
quest. bail; After
r hearing & args, advsm.

Mar. 2 CAMPBELL, D. J.
ORDER admitting to bail $1,000,
10% to be deposi
sited . . . (see below).

2 CAMPBELL, D. J.
ORDER. 1) Parties by Mar. 13
to submit designa
ation of all papers and proceed-
ings in State cou
urt . . . ; 2) Also (same date)
indicate in writin
ng whether either side wishes to

1972

be heard further . . . or if wish to submit without further argument or hearing.

3 CAMPBELL, D. J. All parties before Court; petitioner agrees to restrict travel to Massachusetts; if wish to go over Border, bring to attention of Court; Surety bond executed by petr and surety; 10% deposited ($100).

9 Petitioner's motion for summary judgment, filed. c/s.

9 Petitioner's motion to extend time for filing brief in support of motion for summary judgment, filed.

10 CAMPBELL, D. J. Petitioner's motion to amend bail conditions to work in Portsmouth, New Hampshire, filed. c/s "Upon representation of petitioners' counsel that the Attorney General does not object, the motion is Allowed."

10 CAMPBELL, D. J. Petitioner's motion to amend bail conditions, filed "Upon representation of petitioner's counsel that the Attorney General does not oppose, the motion is Allowed.

13 Joint Designation, and copy of State court record filed.

13 CAMPBELL, D. J. ORDER ENTERED. ". . . 1. That motions for summary judgment be filed forthwith; 2. That the case be set down for oral argument at 4:00 P.M., Wednesday, March 1972." Copy to Messrs Chase, Lawson

27 Memorandum in support of petitioner's motion for summary judgment, filed. c/s

28 Substitute memorandum in support of petitioner's motion for summary judgment, filed. c/s.

30 CAMPBELL, D. J. Hearing on petitioner's motion for summary judgment; arguments; advisement.

1972

Apr. 4 Respondent's memorandum in support of motion to dismiss, filed.

May 2 Marshal's return on Habeas Corpus Ad Prosequendum with service made on March 3, 1972, filed.

25 CAMPBELL, D. J. MEMORANDUM AND OPINION ENTERED. "... I conclude that the petitioner's conviction was under a statute with applicable provisions so encompassing and vague as to violate the First and Fourteenth Amendments. Accordingly, an order is to be entered that the writ of habeas corpus issue and that the petitioner be released from the defendant's custody. Copy to Messrs. Lawson and Chase. West Publishing Co. and The Bureau of National Affairs, Inc.

June 13 CAMPBELL, D. J. ORDER AND JUDGMENT ENTERED: "...It is Ordered that the sentence imposed upon petitioner, Valarie Goguen, by the Superior Court of the Commonwealth of Massachusetts for Worcester County be vacated, and that he be discharged from such sentence, said vacation of sentence and discharge to take effect seven (7) days after the date of entry of this Order and Judgment. Copy to Messrs. Lawson and Chase.

15 Respondent's Notice of Appeal filed. Cpy to Evan Lawson, Haussermann, Davison & Shattuck.

15 Certified copy of docket entries and original pleadings delivered to the Court of Appeals.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner Valarie Goguen brings this petition for a writ of Habeas Corpus pursuant to 28 U.S.C. § 2241.

As grounds therefor the petitioner states:

1. On April 15, 1971, the petitioner was found guilty after trial in the Worcester County Superior Court of a complaint charging that he did publicly treat contemptuously the flag of the United States in violation of G.L. ch. 264 § 5. The petitioner was sentenced to a term of six months in the Worcester County House of Correction.

2. The petitioner is now confined in the Worcester County House of Correction pursuant to that sentence in the custody of the respondent.

3. A summary of the material evidence adduced at the petitioner's trial is as follows:

On January 30, 1970, a Leominster Police Officer observed the petitioner walking in the business district of Leominster wearing a short coat and casual type pants. Sewn to the left side of the petitioner's pants was a miniature American flag.

On the same day another Leominster Police Officer observed the petitioner standing with a group of persons on Main Street in Leominster. The petitioner was wearing a short coat, blue jeans and shoes. The officer was able to observe a cloth American flag approximately 3 x 5 or 4 x 6 inches sewn to the blue jeans in the area of the left portion of the petitioner's buttocks. While the officer questioned the petitioner concerning the flag, the other persons present were laughing.

4. The petitioner was illegally arrested and convicted in violations of his rights under the First and Fourteenth

Amendments to the United States Constitution in that G.L. Ch. 264 § 5 is unconstitutional on its face and as applied to him, because it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials. *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970), *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz. 1970), See, *Street* v. *New York*, 394 U.S. 576 (1969).

5. The petitioner has satisfied the requirements of 28 U.S.C. § 2254 by prosecuting an appeal on exception to the Supreme Judicial Court of Massachusetts wherein the petitioner assigned as error the deprivation of constitutional rights herein complained of. *Commonwealth* v. *Goguen*, Mass. , 1972 Mass. Adv. Sheets .

Wherefore, because of the foregoing, the petitioner is being detained and restrained of his liberty by the respondent in violation of the Constitution of the United States and therefore prays that:

1. A Writ of Habeas Corpus issue directly to the respondent to produce before this Court the body of the petitioner together with the cause of his detention.

2. An order discharging the petitioner from custody.

3. The Court order that the petitioner be released on his own recognizance or such bail as the Court deems proper pending final determination of this petition.

4. The Court issue such other orders as may be appropriate.

By his attorney,
Evan T. Lawson
Glickman, Lawson & Tenney
14 Beacon Street
Boston, Massachusetts 02108

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

MOTION TO DISMISS

Now comes the respondent and, by his attorney, moves this Court to dismiss the petition for a writ of habeas corpus filed herein since it fails to state a claim upon which relief may be granted.

By his attorney,
ROBERT H. QUINN
Attorney General
CHARLES E. CHASE
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

RETURN

Now comes the respondent and, by his attorney, makes the following return and answers to the petition for a writ of habeas corpus filed herein:

A. 1-3. Respondent admits the allegations contained in paragraphs 1 through 3 of the petition.

4. Respondent denies the allegations contained in paragraph 4 of the petition.

5. Respondent admits the allegations contained in the first sentence of paragraph 5 of the petition but denies the remaining allegations contained in said paragraph.

B. And further answering, respondent says that the petition fails to state a claim upon which relief may be granted.

By his attorney,
ROBERT H. QUINN
Attorney General
CHARLES E. CHASE
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Defendants move the court to enter summary judgment in accordance with Rule 56 (a) (c) of the Federal Laws of Civil Procedure on the ground that they are entitled to such judgment on the pleadings and other documents on file as a matter of law, and that there is no issue of fact relevant to such determination as yet unresolved.

By his attorney,
EVAN T. LAWSON

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

ORDER

March 2, 1972

CAMPBELL, D.J.

1. The parties shall before March 13, 1972, submit to the court a designation of all papers and proceedings in the state court which in their judgment should be included in the record of the present case for consideration by this Court.

2. Also by March 13, 1972, the parties shall indicate to this Court in writing whether either side wishes to be heard further on the matters raised in the Petition and Return, or whether they wish to submit them without further argument or hearing.

(s) LEVIN H. CAMPBELL
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

DESIGNATION

The petitioner and respondent hereby designate that for purposes of the proceedings on this petition for a writ of habeas corpus the documents shall be the State Court record as presented to the Supreme Judicial Court of Massachusetts, the briefs of the parties in the Supreme Judicial Court of Massachusetts, and the same are hereto attached.

The parties further say that they desire oral argument on their respective motions for summary judgment and to dismiss.

By

(s) EVAN T. LAWSON
Attorney for Petitioner

(s) CHARLES E. CHASE
Attorney for Respondent

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil No. 72-22-LS

VALARIE GOGUEN
PETITIONER
v.
JOSEPH SMITH
RESPONDENT

MEMORANDUM AND OPINION

May 25, 1972

CAMPBELL, D.J.

I

Petitioner applies for a writ of habeas corpus to obtain release from a six months sentence to the House of Correction imposed after his conviction in the Worcester County Superior Court. The conviction was upon a complaint that he "did publicly treat contemptuously the flag of the United States" in violation of G.L. c. 264 §5.[1] The

[1] §5. Flag; penalty for misuse

Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a representation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used

conviction was affirmed by the Supreme Judicial Court. *Commonwealth* v. *Goguen*, 1972 Mass. Ad. Sh. 303, 279 N.E. 2d 666.

At the time he filed this petition, (February 23, 1972), petitioner had very recently commenced serving the sentence imposed by the Superior Court. The sentence had previously been stayed by the Massachusetts Supreme Judicial Court pending consideration of the state appeal. On March 3, 1972, this Court released the petitioner on bail pending further consideration of his case.

The defendant has filed a return and a Motion to Dismiss the Petition.

The case is submitted by agreement on a record consisting of the record and briefs presented to the Supreme Judicial Court.

The issues were argued by the parties, and briefs were submitted. After consideration, it is my opinion that the writ must be granted.

---

to attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this section be deemed to be upon such flag. Notwithstanding the foregoing, there may be attached to the staff bearing a flag of the United States or of Massachusetts belonging to an organization of veterans of the Civil War, to a camp of the United Spanish War Veterans, to a post or department of The American Legion, or to a post or department of the Veterans of Foreign Wars of the United States, or to a post or department of the Jewish War Veterans of the United States, or to a camp or department of the Sons of Union Veterans of the Civil War, or to a barracks or department of the Veterans of World War I of the U.S.A., or belonging to or used in the service of the United States or the commonwealth, a streamer having inscribed thereon the names of battles and the name and number of the organization to which such flag belongs. For the purposes of this section, a flag shall be deemed to continue to belong to any organization of veterans hereinbefore specified, although such organization has ceased to exist, during such time as it remains in the lawful ownership or custody of any other of the aforesaid organizations or of the commonwealth or of any political subdivision thereof, or of any patriotic or historical society incorporated under the laws of the commonwealth or determined by the adjutant general to be a proper custodian thereof.

II

On January 30, 1970, a Leominster Police Lieutenant observed the petitioner standing with a group of persons on Main Street in Leominster. The petitioner was wearing a short coat, blue jeans and shoes. A cloth American flag, approximately 3 x 5 or 4 x 6 inches was sewn to the blue jeans in the vicinity of the left portion of the petitioner's buttocks. When the Lieutenant questioned the petitioner, the other persons present were laughing.

On the same date another police officer saw the petitioner "walking in the downtown business district of Leominster, wearing a short coat, casual type pants and a miniature American flag sewn on the left side of his pants."

The petitioner was arrested upon a warrant issued by the Leominster District Court. On January 31, 1970, a complaint was issued that the petitioner "on the thirtieth day of January ... at Leominster did publicly treat contemptuously the flag of the United States in violation of G.L. c. 264, §5 as amended."

The petitioner was tried and convicted on this charge in the District Court.

He appealed to the Superior Court, where he was tried before a district court justice sitting by designation and a jury on April 14 and 15, 1971. At the outset of trial in the Superior Court, the petitioner presented and argued a Motion to Dismiss the Complaint on the ground that G.L. c. 264, §5, is unconstitutional on its face and as applied to him under the First and Fourteenth Amendments of the United States Constitution. In the motion, the petitioner asserted that the statute violated the right to due process "in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials." The Motion to Dismiss was denied by the trial judge. A subsequent motion for directed verdict was also denied after argument.

At the trial, the two police officers who had observed the petitioner's conduct on January 30 testified to the facts already outlined.

The defense presented as a witness a so-called vexillologist.* Through him, efforts were made to introduce into evidence various contemporary uses in magazines and newspapers and on products of the "actual design of the United States flag and the stars and stripes pattern," including ties made of flag material, pants with a stars and stripes design, a footstool with a flag on the seat, and a bathing suit of flag design. This evidence was offered to assist the jury in determining whether the defendant's treatment of the flag was contemptuous by contemporary standards. Objections made by the Commonwealth to introduction of the foregoing were sustained by the trial judge.

The defense vexillologist testified that the flag the defendant was alleged to have been wearing conformed to official standards.

The trial judge refused the defendant's request that he instruct the jury that in order to find the defendant guilty they must find that the flag alleged to have been treated contemptuously was an official flag of the United States within the meaning of, and as defined by Executive Order number 10834, issued by the President of the United States pursuant to Title 4 United States Code, chapter one, section one, and set forth therein. (It is not entirely clear what instructions the judge gave. It would appear from page 2 of the Bill of Exceptions that he left it to the jury to determine what the term "flag of the United States" meant).

The jury returned a verdict of guilty and sentence was entered thereon.

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* A word apparently denoting an expert on flags, from the Latin velum (cloth, sail, veil) and the word vexillum (a standard).

A timely Bill of Exceptions was thereafter prepared, and an amended bill allowed by the trial judge; and the petitioner's exceptions were heard by the Supreme Judicial Court. In its rescript opinion, the Court rejected the petitioner's "claim that the statute is on its face or as applied to him a restraint upon the right of freedom of speech guaranteed by the First Amendment." While the Court did not refer specifically in its opinion to the Fourteenth Amendment, it stated, "[W]e see no vagueness in the statute as applied here." The Court also ruled that rejection of the vexillologists's evidence as to contemporary use and treatment of the flag was not an abuse of discretion.

No contention is now made that the petitioner has not exhausted state remedies, nor that the constitutional issues presented here were not raised appropriately in state proceedings.

III

Flag cases have proliferated in the past several years. Most deal with situations carrying overtones of political protest. Others, like the present one, seem to stem more from the contemporary use of the national flag as an object of youth fashion and high camp: one sees the flag on ski-sweaters, shirts, hats, helmets, shopping bags, automobiles and jackets, often in conjunction with no discernible set of beliefs. These new, informal usages, at variance with traditional flag etiquette, add to the difficulty of interpreting older flag laws which, like the Massachusetts law, condemn one who treats the flag contemptuously, but do not define exactly what is meant.

In this case, two issues are uppermost. First, to what extent the Commonwealth of Massachusetts may constitutionally regulate conduct towards the flag of the United States. Second, if it may regulate such conduct, whether the penal statute under which the petitioner was convicted

is sufficiently limited in scope measured by the standards of the First and Fourteenth Amendments.[1A]

Both questions arise because, as is now generally agreed, many types of flag use and flag alteration are "symbolic expression".[2] Only as necessary to further a substantial or important governmental interest may the state curtail symbolic expression. See *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968).

In the recent flag cases, courts have identified two governmental interests as authorizing certain types of flag regulation.

One is the state's undoubted interest in preventing breaches of the peace.[3] However, that interest may be exercised only in narrowly drawn legislation directed towards conduct which, under the specific circumstances of the moment, may incite retaliation. See *Gooding* v. *Wilson*, 40 U.S.L.W. 4329 (U.S. Supreme Court, March 23, 1972). Unquestionably an insult to the national flag may sometimes threaten to provoke a breach of the peace. But often it may not. (In the present case, for example, there was no evidence that petitioner's conduct threatened a breach of the peace; and the Massachusetts statute does not require proof that a breach of the peace is imminent. Accordingly, a valid state interest sufficient to sustain the peti-

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[1A] The most recent treatment of the constitutionality of a conviction for flag desecration by the Supreme Court is in *Street* v. *New York*, 394 U.S. 576 (1969), holding that contemptuous language directed at the flag could not be constitutionally punished under a state statute. The court left unresolved whether the state could punish flag burning.

[2] *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir. 1970). *Hoffman* v. *United States*, 445 F.2d 226 (D.C. Cir. 1971). *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz. 1970). *Parker* v. *Morgan*, 322 F. Supp. 585 (W.D.N.C. 1971). *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970). *Sutherland* v. *DeWulf*, 323 F. Supp. 740 (S.D. Ill. 1971). *Thoms* v. *Smith*, 334 F. Supp. 1203 (D. Conn. 1971).

[3] *People* v. *Lindsay*, Ill. Sup. Ct. 3/30/72, reported at 11 Cr. L. 2090-1. See *Thomas* v. *Smith*, supra, 1211.

tioner's conviction cannot be premised upon the state's authority to prevent breaches of the peace.)

A broader, and, I think, more pertinent ground for flag legislation is to be found in the state's interest in preventing the desecration of our symbol of national unity. The flag reflects the common ideal which binds us together. It stands for no particular ideology other than the general loyalty and patriotism of all citizens. That loyalty and patriotism may be expressed in dissent as well as in agreement with the majority. To require one not to mutilate or defile the flag is merely to require him to refrain from physically insulting a symbol venerated by the vast majority of his countrymen. The state may exercise some degree of control over shocking conduct, at least where the "shock effect" stems from physical acts remote from the articulation of ideas. See *Street* v. *New York*, 394 U.S. 576, 592-593 (1969).

In any event, a state, in my view, has an interest sufficient to justify a statute narrowly drawn to prohibit mutilating, desecrating, or otherwise physically damaging the flag.[4]

Such a narrowly drawn statute was upheld in *Hoffman* v. *United States*, supra, 445 F.2d 226. The Court of Appeals for the District of Columbia approved the federal flag desecration statute (18 U.S.C. §700), but took pains to interpret its language so as to prohibit only acts of physical desecration and mutilation visited directly upon the flag itself. The court said, at 228,

> The right of symbolic expression of opinion, not excluded from the protection of the First Amendment, is involved in this case .... It follows that in order for this statute to avoid possible conflict with the

[4] *Hiett* v. *United States*, 415 F.2d 664 (5th Cir. 1969). *People* v. *Cowgill*, 78 Cal. Rep. 853 (1969); appeal dismissed, *Cowgill* v. *California*, 396 U.S. 371 (1970).

Amendment, the curtailment of expression goes no further than the language of the statute clearly requires. The legislative history of the federal act, enacted in 1968, was found to show a Congressional intention to condemn only the physical dishonor or destruction of the flag. The narrow language was said to be deliberate, to take account of Supreme Court decisions expanding the scope of First Amendment protections since the decision in *Halter* v. *Nebraska*, 205 U.S. 34 (1907).[5]

While courts have tended to sustain statutes punishing physical desecration of the flag, they have in recent years taken a different view of older state statutes which, like the Massachusetts flag statute, go well beyond prohibiting physical mutilation and destruction.

These latter typically contain language making it a crime to cast contempt upon the flag by word or deed (*Crosson* v. *Silver*, supra; *Parker* v. *Morgan*, supra; *Hodsdon* v. *Buckson*, supra; cf. *Sutherland* v. *Dewulf*, supra) or to "misuse" the flag (*Thoms* v. *Smith*, supra). The strong tendency in recent federal decisions is to hold that such statutes are overbroad, in that they improperly attempt to regulate mere verbal insults directed at the flag, nonverbal insults of a like nature, and breaches in flag etiqette. As the three-judge district court said in *Parker* v. *Morgan*, supra, 322 F. Supp. at 589, 590:

> Protection of the flag, qua flag, is one thing. To go further and forbid expression of attitudes by a gesture or even facial expression is quite another... The right of protest includes the right to be derisive, disdainful, contemptuous, and even defiant of government and what may be thought to be in a given context its symbols of authority.
>
> * * * * *

[5] In the *Hoffman* case, the court held that the defendant had not violated the federal act by wearing a shirt resembling the flag.

> We do not doubt the right of a citizen, however misguided, to turn thumbs down at the flag, or stick out his tongue, or salute it with a clenched fist, or otherwise express his derision and contempt for what to him it may represent. (footnote omitted)
>
> We think the line must be drawn at the point of contemptuous physical contact with the clearly defined flag and that physical protection of the flag itself is the outermost limit of the state's legitimate interest.

There is, I believe, much practical good sense in an accommodation which recognizes the state's right to regulate physical desecration while declining to permit it to enter the murky area where speech and attitudes are far more involved.

Focusing upon whether the Massachusetts statute is sufficiently limited in scope so as not to prohibit constitutionally protected conduct, it would seem apparent from what has already been said that it presents serious difficulties. Even if petitioner's silly conduct might be punished under a more narrowly drawn flag statute,

> the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Gooding* v. *Wilson*, 40 U.S.L.W. at 4330 (U.S. Supreme Court, March 23, 1972).

As already stated, the Massachusetts statute does not merely punish acts of contempt towards the flag which threaten to cause a breach of the peace. It punishes anyone who publicly treats contemptuously the flag regardless of surrounding circumstances.[6]

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[6] In any event, there was no evidence of a threatened breach of the peace in this case. The evidence shows only that the people near the petitioner were laughing.

Nor does the Massachusetts statute (in contrast to the federal statute) merely punish those acts of contempt amounting to physical mutilation, defacement, burning or the like. Rather, it punishes anyone who "publicly . . . treats contemptuously" the flag.

The statutory language, on its face, condemns a spectrum of expression and conduct much of which the First Amendment, as it is now interpreted, protects. See *Gooding* v. *Wilson*, supra.

The words "treats contemptuously" can reasonably be read to permit prosecution for verbal insults to the flag, and non-verbal insults, such as turning thumbs down or sticking out one's tongue at the flag. However, the state, under the First Amendment, lacks the power to punish such actions. *Street*, supra; see *Parker*, supra.

In addition (especially these days when flags are commonly displayed on hats, garments and vehicles), the words "treats contemptuously" do not provide a readily ascertainable standard of guilt. The words leave conjectural, in many instances, what conduct may subject the actor to criminal prosecution. See *Papachristou* v. *City of Jacksonville*, 40 U.S.L.W. 4216 (February 24, 1972). It is not clear, for instance, to what extent they prohibit any public deviation from formal flag etiquette—for example, a failure to remove one's hat when the flag passes. At least until recently, the unauthorized display of the flag on a jacket would have been regarded by many as contemptuous. Is such conduct today contemptuous within the meaning of the statute? Would it be a violation of the statute to sew the flag on one's pants leg or jacket? Is the statute violated if the flag is flown in a position subordinate to the United Nations flag? (*Hodsdon* v. *Buckson*, supra, at 535.) Is a flag worn on a shirt by a veteran permissible, but a flag worn upside down on a shirt by a yippie or a peace marcher contemptuous? Do the attitude and politics of

the person wearing the flag determine whether its display is contemptuous? If so, would not the statute punish attitudes and views rather than specific conduct?

As worded, the statute sets "a net large enough to catch all possible offenders," leaving it to the police and the courts to pick and choose whom to prosecute and convict. *Papachristou* v. *City of Jacksonville*, supra. It may be said to encourage arbitrary and erratic arrests and convictions.

In *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir. 1970), the Court said, at 348,

> ... if there is a reading of a penal statute which authorizes local law enforcement officers to prosecute traditional First Amendment activity, such a statute is unconstitutionally over broad, despite the fact that the statute may also purport to prosecute activity not entitled to constitutional protection ...

An overly-broad and vague statute permits selective law enforcement. It "leaves wide open the standard of responsibility, so that it is easily susceptible to improper application." *Gooding* v. *Wilson*, supra, at 4332.

The present statute may have been little used in borderline cases. The good sense of Massachusetts law enforcement authorities has doubtless, on most occasions, been a sufficient shield against its abuse. But G.L. c. 264, §5 can

> withstand . . . attacks upon its facial constitutionality only if, as authoritatively construed by [the state] courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments . . . *Gooding* v. *Wilson*, supra, at 4330.

No such authoritative construction by a state court exists.

I conclude that the petitioner's conviction was under a statute with applicable provisions so encompassing and vague as to violate the First and Fourteenth Amendments.

Accordingly, an order is to be entered that the writ of habeas corpus issue and that the petitioner be released from the defendant's custody.

(s) LEVIN H. CAMPBELL
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil No. 72-22-LC

VALARIE GOGUEN
PETITIONER
v.
JOSEPH SMITH
RESPONDENT

ORDER AND JUDGMENT

June 13, 1972

CAMPBELL, D.J.

In accordance with the Memorandum and Opinion filed May 25, 1972,

It is Ordered that the sentence imposed upon petitioner, Valarie Goguen, by the Superior Court of the Commonwealth of Massachusetts for Worcester County be vacated, and that he be discharged from such sentence, said vacation of sentence and discharge to take effect seven (7) days after the date of entry of this Order and Judgment.

(s) LEVIN H. CAMPBELL
United States District Judge

Dated June 13, 1972

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
[Caption Omitted in Part]

NOTICE OF APPEAL

Now comes the respondent and, by his attorney, appeals from the memorandum and opinion of the Court entered on May 25, 1972 and also appeals from the order and judgment of the Court entered on June 13, 1972.

By respondent's attorney:
ROBERT H. QUINN
Attorney General
(s) CHARLES E. CHASE
CHARLES E. CHASE
Assistant Attorney General

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1204

VALARIE GOGUEN,
PETITIONER, APPELLEE,
v.
JOSEPH SMITH, as he is Sheriff of Worcester County,
RESPONDENT, APPELLANT.

DOCKET ENTRIES

1972

June 16 Record on appeal in one volume filed and case docketed.

22 Appearance of Evan T. Lawson for appellee filed.
Appearance of Charles E. Chase for appellant filed.

26 Statement and designation filed.

1972

July 21 Brief for appellant and appendix in one volume filed.

Aug. 10 Brief for appellee filed.

24 Assigned for hearing at the September, 1972, session.

Sept. 7 Heard before Coffin, Ch.J., and McEntee and Hamley, JJ.

Dec. 14 Judgment: The judgment of the district court is affirmed. Opinion of the Court by Coffin, Ch.J., and concurring opinion by Hamley, J. Notices mailed.

1973

Jan. 4 Mandate issued; copy filed. Taxation of costs filed. Original papers returned to the district court.

29 Notice of appeal filed.

Mar. 26 Notice from Supreme Court of filing a petition for certiorari (3/14/73) (72-1254) filed.

The Opinion of the United States Court of Appeals for the First Circuit can be found at pages 21 through 50 of the Jurisdictional Statement previously filed in this Court.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1204

VALARIE GOGUEN,
PETITIONER, APPELLEE,
v.
JOSEPH SMITH, as he is Sheriff of Worcester County,
RESPONDENT, APPELLANT.

JUDGMENT

Entered: December 14, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1204

VALARIE GOGUEN,
PETITIONER, APPELLEE,
v.
JOSEPH SMITH, as he is Sheriff of Worcester County,
RESPONDENT, APPELLANT.

NOTICE OF APPEAL

Notice is hereby given that Joseph Smith, respondent-appellant above named, hereby appeals to the United States Supreme Court from the judgment entered in this action on the fourteenth day of December, 1972.

By Respondent-Appellant's Attorney,
ROBERT H. QUINN
Attorney General

(s) _____
CHARLES E. CHASE
Assistant Attorney General